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Supreme Court of the United States

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF RICHARD REID ROGERS, APPELLANT,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED JUNE 26, 1936.

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Supreme Court

OF THE STATE OF NEW YORK,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

Statement Under Rule 234.

This proceeding was commenced by the service on the respondents of a notice of motion dated April 16, 1935, for an order directing the issuance of a writ of certiorari. The order was entered upon consent on the 26th day of April, 1935, and the writ of certiorari was allowed and issued on the same day.

The writ of certiorari was served upon the respondents and service thereof acknowledged on April 29, 1935. The respondents filed their return to said writ in the office of the Clerk of Albany County on May 13, 1935.

4 *Statement Under Rule 234.*

The relator herein appeared in person on his own behalf. The respondents herein appeared by John J. Bennett, Jr., Esq., Attorney General of the State of New York. There has been no change of attorneys or parties herein.

Petition for Certiorari.

SUPREME COURT,

ALBANY COUNTY.

5

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS, Relator, against MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York, Respondents.	Income Tax for the years 1927, 1928 and 1929.

6

The petition of Richard Reid Rogers respectfully shows:

FIRST: The petitioner at the time hereinafter mentioned resided in the City, County and State of New York.

SECOND: The defendants are the Commissioners constituting the Tax Commission of the State of New York.

THIRD: For each of the years 1927, 1928 and 1929 the petitioner duly made a personal income tax return, pursuant to the Tax Law of the State of New York and Section 367 thereof, and paid to the Tax Commissioners the amount of tax payable as the same appeared from the face of each of such returns.

FOURTH: The State Tax Commission recomputed the petitioner's tax for the aforesaid years of 1927, 1928 and 1929 and assessed against the petitioner, under date of February 13, 1931, additional taxes as follows:

Assessment Number	*Year*	*Amount*
504301	1927	$300.00
504302	1928	300.00
504303	1929	290.00

FIFTH: Thereafter, and on or about February 14, 1931, the petitioner duly made application, pursuant to Section 374 of the Tax Law, for a revision of the foregoing assessments, and on the 30th day of March, 1935, the Tax Commission 9
made its determination denying said application. A copy of said determination is hereto annexed, marked Schedule A.

SIXTH: Petitioner is advised, and on information and belief alleges, that such determination is erroneous, inasmuch as the additional tax computed and charged by the State Tax Commission

for the years aforesaid was a tax to cover the annual salary for the said years paid respondent by the Panama Rail Road Company, which said company is a wholly-owned and controlled instrumentality of the United States Government engaged in the construction, operation and maintenance of the Panama Canal; that the Congress of the United States has never consented to the taxation thereof, or of the salaries paid its officers, by the State of New York; and that by reason thereof, under the Constitution of the United States, the said Rail Road Company and the salaries paid to its necessary officers and employees are exempt from state
11 income taxation.

SEVENTH: Petitioner has heretofore deposited with and paid to the Tax Commission under protest the full amount of the taxes, interest and other charges audited and stated in such determination and has duly filed an undertaking for costs and charges approved by a Justice of the Supreme Court in compliance with the provisions of Section 375 of the Tax Law.

EIGHTH: No previous application for the writ herein sought has been made to any court or judge.

12 WHEREFORE, the petitioner prays that the said determination of the State Tax Commission may be reviewed and said assessment vacated and that a writ of certiorari may issue out of this Court to the defendants as Commissioners constituting the State Tax Commission of the State of New York, commanding them to make return to said writ pur-

suant to law, and that the petitioner may have such other and further order or relief as may be proper.

Dated, New York, N. Y., April 16, 1935.

RICHARD REID ROGERS,
Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD REID ROGERS, the petitioner above named, being duly sworn, says that he has read the foregoing petition and is acquainted with the facts alleged therein, and that the same is true to his knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

RICHARD REID ROGERS.

Sworn to before me this
16th day of April, 1935.

ANDERSON WOODS,
Notary Public,
(Seal) Kings County No. 334.
Cert. filed in N. Y. County No. 211.
Cert. filed in Orange County.
Commission expires March 30, 1937.

16 **Schedule A to Petition.**

DETERMINATION OF STATE TAX COMMISSION.

STATE OF NEW YORK,

THE STATE TAX COMMISSION.

IN THE MATTER OF The application for revision of additional taxes assessed against RICHARD REID ROGERS for the years 1927-1928 and 1929.

17

Returns of income on behalf of the above named taxpayer for the taxable years 1927, 1928 and 1929 having been duly filed at the times when required by statute in accordance with the provisions of Article 16 of the Tax Law; and on audit of such returns, additional taxes having been found due for such periods in the amounts of $300 for the year 1927, which tax was duly assessed under date of February 13th, 1931, assessment notice No. 504301, and in the amount of $300 for the taxable year 1928 assessed under date of February 13th, 1931, assessment No. 504302, and in the amount of

18

$290 for the taxable year 1929 assessed under date of February 13th, 1931, assessment notice No. 504303, all of which taxes were duly paid under date of February 26th, 1931, and the taxpayer having duly made application under Section 374 of the Tax Law for recomputation and revision of such assessments; and the matter having come on for formal hearing before Honorable Cortland A.

Wilber, a Deputy State Tax Commissioner, duly designated under the provisions of Section 171 of the Tax Law to hold formal hearings, at the office of the Commission, 80 Centre Street, New York City, on the 26th day of February, 1935; and the taxpayer having appeared in person and given oral testimony and the taxpayer having filed an affidavit duly verified under date of December 15th, 1934, together with a memorandum in his own behalf and others, which affidavit and memorandum and the minutes of said hearing are made a part of the record herein; and all the questions of law and fact present having been duly considered by the Commission, it is

DETERMINED: That the computation of the additional taxes against said taxpayer for the years 1927, 1928 and 1929, respectively, in accordance with the audit of said returns was correct; and that the additional taxes so stated were properly assessed and due; and do not include any taxes or other charges which should not have been lawfully demanded, and that no payments have been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the taxes so assessed.

Dated, Albany, N. Y., March 30, 1935.

THE STATE TAX COMMISSION,
MARK GRAVES,
Commissioner.
JOHN P. HENNESSEY,
Commissioner.

22

Order Granting Certiorari.

At a Special Term of the Supreme Court held in and for the County of Albany at the County Court House in the City of Albany on the 26th day of April, 1935.

Present: GILBERT V. SCHENCK, *Justice*.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS, Relator, against MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York, Respondents.	Income Tax for the years 1927, 1928 and 1929.

23

On reading and filing the petition of Richard Reid Rogers, verified the 16th day of April, 1935, notice of the application and proof of service of said petition and notice having been made upon the State Tax Commission, and upon proof of filing

24 with said Tax Commission an undertaking duly approved by a Justice of the Supreme Court to the effect that if the writ of certiorari applied for in the above entitled proceeding is dismissed, or the determination of the Commission confirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals, and the

petitioner having deposited with the State Tax Commission the full amount of taxes, percentage, interest and other charges audited and stated against it, and it appearing that John J. Bennett, Jr., Attorney General of the State of New York and attorney for the State Tax Commission, has duly consented to the granting of a writ of certiorari as prayed for in said petition;

NOW, on motion of Richard Reid Rogers, the petioner, appearing in person for said petition, it is

ORDERED that a writ of certiorari be issued out of and under the seal of this Court as prayed for in said petition directed to Mark Graves, John J. Merrill and John P. Hennessey, constituting the State Tax Commission of the State of New York, returnable at the office of the clerk of the Supreme Court in and for the County of Albany within twenty days after the service thereof, to review the taxation set forth in the petition herein.

Enter,

GILBERT V. SCHENCK,
J. S. C.

Consent is hereby given to the entry of the within order granting writ of certiorari.

Dated, April 26, 1935.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for State Tax Commission.

RICHARD REID ROGERS,
Petitioner in Person.

28 **Writ of Certiorari.**

SUPREME COURT,

STATE OF NEW YORK,

COUNTY OF ALBANY.

[SAME TITLE.]

WHEREAS, we have been informed by the petition of Richard Reid Rogers, verified the 16th day of April, 1935, that theretofore the State Tax Commission recomputed the personal income tax of the petitioner for the years 1927, 1928 and 1929, and
29 assessed against the petitioner, under date of February 13, 1931, additional taxes amounting for the year 1927 to $300.00, for the year 1928 to $300.00, and for the year 1929 to $290.00, and that thereafter and upon the application for the revision of said assessment the said Commission did, on the 30th day of March, 1935, make its determination denying the said application and confirming said assessment in the amounts above stated, and

WHEREAS, it is alleged by the petition that in imposing said additional tax and thereafter confirming same, injustice has been done to said Richard Reid Rogers, the petitioner herein, and that said tax so imposed as aforesaid is erroneous and
30 illegal and we being willing to be certified of your proceedings in the premises as such Tax Commission in imposing and exacting such tax, and in all things relating thereto do command you to certify and return to the office of the County Clerk of the County of Albany, within twenty days after service of this writ upon you, all and singular the accounts and all the evidence before you upon the

application for revision and readjustment of said tax, and all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all the accounts, affidavits and all the evidence submitted to you or which were before you in, of or concerning the said matter or matters of the said account for taxes aforesaid against said Richard Reid Rogers, to the end that said account or accounts, revision or readjustment thereof, and your decision or decisions thereon, may be revised and corrected by this court according to law.

WITNESS, HON. GILBERT V. SCHENCK, Justice of the Supreme Court, at the County Court House in the City of Albany, this 26th day of April, 1935.

JOHN A. KNOX,
Clerk.

The foregoing writ of certiorari allowed this 26th day of April, 1935.

GILBERT V. SCHENCK,
Justice.

Return of State Tax Commission.

SUPREME COURT,

ALBANY COUNTY.

[SAME TITLE.]

The respondents above named, obedient to an order and writ of certiorari, granted herein by Mr.

34 *Return of State Tax Commission.*

Justice Gilbert V. Schenck on the 26th day of April, 1935, hereby make return thereto consisting of all and singular the accounts and the evidence before them upon the application for revision and readjustment of certain assessments of income tax against the relator for the calendar years 1927, 1928 and 1929, and all and singular their proceedings, decisions and actions and all the accounts, affidavits and evidence which were submitted to or which were before them in, of or concerning the said assessments of income tax, as follows:

35 Exhibit (1) New York State income tax resident return of Richard Reid Rogers for the calendar year 1927.

(2) New York State income tax resident return of Richard Reid Rogers for the calendar year 1928.

(3) New York State income tax resident return of Richard Reid Rogers for the calendar year 1929.

(4) Notice of additional assessment of income tax, Notice No. 504301, dated February 13, 1931, amount $300.

(5) Notice of additional assessment of income tax, Notice No. 504302, dated February 13, 1931, amount $300.

36 (6) Notice of additional assessment of income tax, Notice No. 504303, dated February 13, 1931, amount $290.

(7) Transcript of testimony, hearing held at New York City February 26, 1935.

(8) Affidavit of Richard Reid Rogers, verified December 15, 1934, to which

are appended Exhibits Nos. 1 to 7, inclusive.

(9) Determination of the State Tax Commission, bearing date March 30, 1935.

Respondents deny each and every allegation in the petition herein, except in so far as the same are shown to be true by this return.

Respondents allege that the taxes imposed herein were justly and legally imposed under the laws of the State of New York.

IN WITNESS WHEREOF, the State Tax Commission hereunto sets its hand and seal this 9th day of May, 1935.

STATE TAX COMMISSION,
By MARK GRAVES,
President.
JOHN J. MERRILL,
Commissioner.

Stipulation as to Exhibits 1 to 6 to Return.

SUPREME COURT,

ALBANY COUNTY.

[SAME TITLE.]

IT IS HEREBY STIPULATED, by and between the respective parties hereto, that the matters pertinent to this proceeding, in Exhibits 1 to 6, inclusive, set

40 *Stipulation as to Exhibits 1 to 6 to Return.*

forth in the return of the respondents to the order of certiorari herein, are as follows:

1. In relator's income tax return for the calendar year 1927, he reported as "non-taxable income" the sum of $15,000 as "compensation paid by U. S. A. through Panama Railroad Co., an exclusive government agency." No tax was paid thereon.

2. In relator's income tax return for the calendar year 1928, he reported as "non-taxable income" the sum of $15,000 as "Sal. paid by Panama Railroad, a wholly controlled
41 U. S. Government agency." No tax was paid thereon.

3. In relator's income tax return for the calendar year 1929, he reported as "non-taxable income" the sum of $15,000 as "Salary paid by the Panama Railroad Co., an exclusive agency of the United States Government." No tax was paid thereon.

4. Under date of February 13, 1931, the relator was, as shown in the determination of the Tax Commission, assessed an additional tax of $300 for the calendar year 1927, an additional tax of $300 for the calendar year 1928,
42 and an additional tax of $290 for the calendar year 1929; all of which assessments were paid by the relator under date of February 26, 1931, as set forth in the determination of the Tax Commission. (Exhibit 9 of Return.)

5. The additional taxes assessed against relator as aforesaid were assessed solely upon the salaries paid relator by the Panama Rail

Road Company for the respective years upon the ground, as set forth in said notices, that such salaries were considered taxable.

6. It is further stipulated that the said Exhibits 1 to 6, inclusive, need not be printed in the record in this proceeding, and that this stipulation be printed in place and stead thereof.

Dated, May 21st, 1935.

RICHARD REID ROGERS,
Attorney for Relator.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondents.

46

Exhibit 7 to Return.

Transcript of Testimony.

IN THE MATTER

OF

The application of RICHARD REID ROGERS under Section 374 of the Tax Law for revision and readjustment of additional assessments #504301, #504302 and #504303 for the taxable years 1927, 1928 and 1929.

47

FORMAL HEARING.

New York City, February 26, 1935.

PRESENT:

MR. CORTLAND A. WILBER, Deputy Commissioner, Income Tax Bureau.

MR. ROY H. PALMER, First Assistant Director, Income Tax Bureau.

APPEARANCE:

MR. RICHARD REID ROGERS, 74 Trinity Place, New York City.

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Mr. Palmer: There have been put into evidence heretofore the income tax returns of Mr. Rogers for the years in question together with affidavits filed by Mr. Rogers and all correspondence pursuant thereto, so that we will consider the file or such material as is pertinent as a part of this record.

(Mr. Richard Reid Rogers sworn by Commissioner Wilber.)

Mr. Palmer to Mr. Rogers: Mr. Rogers, you are the taxpayer in this matter. You are the general counsel of the Panama Rail Road Company? A. Yes, sir.

Q. And briefly restating the facts which are before us, it is your contention that the salary or other compensation which is paid you by the Panama Rail Road Company does not constitute a part of your gross income taxable under the income tax law of the State of New York on the theory that the Panama Rail Road Company is an instrumentality of the United States? A. Yes, except there is no other compensation outside of the salary.

Q. In supplementing the affidavits which you have already filed and which contain much information I would like to ask you questions relative to certain methods of operation of the Panama Rail Road and the method of paying its employees. The Panama Rail Road Company does a general transportation business, does it not, Mr. Rogers? A. Yes.

Q. You are familiar entirely with all its methods of doing business? A. Practically.

Q. It has its principal office in the City of New York? A. Yes, the president, however, is located on the Isthmus of Panama.

Q. And it has offices there? A. Yes.

Q. It operates a railroad across the Isthmus and operates steamers between New York and what points? A. The only points between which the steamers operate at the present time are between New York and Cristobal, Canal Zone. However, I think they have a stoppage at Haiti, some of the ships.

Q. What was the case in these years—1927, 1928 and 1929? A. I don't think they went to Haiti:

52 *Exhibit 7 to Return—Testimony.*

only to the Canal Zone. I am not sure as to these years covered by this inquiry. Ships were at one time temporarily operated from the Canal Zone to distribute cargo in South America.

Q. Does the Company operate any steamers from the Canal Zone to California? A. No.

Q. What does it do with its freight and with the passengers it transports from New York to Panama Zone, or Canal Zone, who are traveling to California or freight being transported? A. They merely transport freight and passengers to Panama or the Canal Zone itself.

53 Q. They take no freight for the Western coast? A. No, they have no arrangements with Pacific carriers.

Q. How large an office do they operate in New York, does the Company? A. You mean the number of employees?

Q. Yes, the number of employees. A. I imagine there must be in the office itself, I would say, nearly 100 employees, just a guess. In addition to that they have dock engineers and men who check the cargo and freight clerks and others of that sort and passenger agents who handle their business.

Q. The title to the dock is in the name of the corporation? A. It is leased from the City of New York in the name of the corporation.

54 Q. Does it occupy its own office building in New York? A. No, it does not. It rents space.

Q. Does the Government guarantee the lease of the dock or the office? A. No, the Government doesn't guarantee the lease of the office but my impression is that the lease of the dock is secured by deposit of collateral.

Q. Of the corporation's collateral? A. Yes; the corporation's collateral, of course.

Q. Has the corporation any office in Washington? A. No, they have no office of their own in Washington but there is a very close connection between the Panama Rail Road Company and the Isthmus Canal Zone Commission and the Chief of Office of the Panama Canal also handles business there, such as it is, of the Panama Rail Road Company. He is also Director.

Q. Does the corporation solicit freight or passenger business? A. Yes, in a way.

Q. Through advertising? A. No, it doesn't do it through advertising.

Q. Through agents? A. I think I ought to state, if you have no objection, just what the function of this steamship line is. The steamship line has been maintained for many years under the policy of administration as a necessary line of communication between continental United States and the Canal Zone. The Panama Rail Road Company conducts a Commissary Department upon the Isthmus. It is selected for that purpose for accounting reasons, because of considerable facility as contrasted with the accounting methods of the Government. Originally the receipts from everything the Government operates has to be paid in to the treasury and then reappropriated. It also affords a concession of 25% for government freight, and other concessions to the employees of the Government. It brings the employees of the railroad company and of the Commission to the United States upon their annual vacations due to the climate. They are transported here for $20 a passage, occasionally; never at over $30; so the greater portion of the service between New York and the Canal Zone is taken up with the transfer of Government freight and Government employees. Outside of that there is a certain amount of which you might call commercial busi-

ness. There are people who travel there and pay full passage on steamers, and as there is always more space available than the Government cargo occupies, outside cargo is then handled like any other steamship would handle it.

Q. The corporation charges the Government for freight, for transporting freight? A. They charge the Government 75% of the regular tariff rates and they charge the Government employees from $20 to $30. That is in both cases very much less than the actual cost of service. The steamship line has been operated at a deficit for a number of years but it is necessary to maintain it, to have this line of communication. It is the policy of the Government that we should control that line of communication.

Q. Didn't I read in the paper that the Panama Rail Road Company had declared a dividend? A. They declared a dividend of practically everything they earned; they declared it over to the Government of the United States.

Q. They must have earnings to do that. A. Yes, they always have earnings.

Q. What do you mean, they operate at a deficit? A. I mean the steamship line. The other lines of activity offset this deficit.

Q. How many steamers do they own and operate? A. Four.

Q. Do they lease any? A. No. Two of the steamers were bought by the Government of the United States by special appropriation, and at other times ships have been bought for the Rail Road Company by Government appropriations. When the operation of the Rail Road Company ceases they are to be turned over to the Government.

Q. How is the regular tariff for the transportation of freight and passengers fixed? A. Well, that is fixed to conform in a general way with the tariffs of other lines.

Q. So that relatively the charge made for transportation of freight and passengers is about the same as that charged by any other transportation line? A. Yes; except with respect to these Government employees and Government freight.

Q. Yes, and as for the charges on the Isthmus itself, do you carry much freight there aside from the Government freight? A. No, I don't think there is very much freight carried there; but what happens is this, a great many ships which use the Canal split the cargoes when they go there. They may have cargoes, some for the United States and some for South America, and they have to avail themselves of the facilities on the Isthmus owned and operated by the railroad. There is a great deal of that done in that way.

Q. The rates there do not have to be fixed by competition at all? A. The rates are not fixed by competition except where there is a rate fixed in connection with some other line, when they get a certain division of the through rates to cover the transfer across the Isthmus.

Q. Now, how are the salaries of the employees and the officials of the Company paid? A. They are paid by checks of the Panama Rail Road Company.

Q. Not by the Government? A. Not by the Government except in a sense the Government owns the Panama Rail Road Company.

Q. They are paid out of the moneys that flow in from the operation of the Company itself? A. Yes.

Q. Those checks do not have to be signed or endorsed by any Government official? A. No.

Q. Now, in case of an action for damages which might lie against the corporation, would there be any liability of the United States Government? A. There is not, simply because the United States Government under various acts of Congress has excluded immunity for the Panama Rail Road Company, the idea being that damages for personal injuries, of which there are quite a number, are part of the operating cost and should be treated as such and paid out of the funds of the Company.

65 Q. Assuming the corporation was operating at a deficit and had no available funds, judgments for damages against the corporation could not be collected from the Government? A. I don't suppose it could; but what has happened heretofore, even in the case of Panama Rail Road Company employees, there have been from time to time specific appropriations of Congress to cover that. That was in the early stage. It is now covered by general law.

Q. When a vacancy occurs in the Board of Directors of the corporation how is it filled? A. It is practically filled by the Secretary of War, that is to say, recommendations may be made to him of this, that or the other man to fill the position, but

66 when the approval of the Secretary of War is received, then he is elected to office.

Q. That, of course, is not an essential requirement of law or by-laws of the Company? A. It isn't an essential requirement, it is simply because Congress who owns the stock has decreed that the Secretary of War shall exercise all functions in connection with acts of Congress relating to the Railroad.

Q. I assume the Board of Directors meet at regular intervals? A. Yes.

Q. Take the same action as the Board of any other corporation would do? A. They do.

Q. I assume they meet and elect a director ordinarily to succeed one who has resigned? A. This form is put through. The Board of Directors invariably take the matter up of the selection of the director with the Secretary of War as representing the sole stockholder, the Government.

Q. I think that covers the question I wanted to bring out, Mr. Rogers. A. I don't think there is anything I haven't set forth in the affidavit or by reference to different acts of Congress, which I think is the main thing.

Q. I assume that if we should make a determination against you, that all of those matters would be in your brief. A. They would all be in the brief and I believe I have already filed with you a memorandum of law. If I correctly understand the law, the main issue here is whether the Panama Rail Road Company is really an instrumentality of the Government of the United States in connection with the operation of the Panama Canal. I further understand that if that is the fact the salaries of the officials should be exempt, and the case really rests upon *McCullough* v. *Maryland*. There, Chief Justice Marshall held the States could not tax the Bank of United States although the Bank of United States was organized by private individuals and was likewise engaged in operations for profit. That is the principal point upon which we rely. That will be a matter for argument and brief.

Q. We have completed the record.

70 **Exhibit 8 to Return.**

Affidavit of Relator.

BEFORE THE

STATE BOARD OF TAX COMMISSIONERS.

IN THE MATTER OF Application for exemption of WILLIAM R. PFIZER, VICTOR M. NEWTON and RICHARD REID ROGERS of state income taxes upon fixed salaries paid them by the Panama Rail Road Company.

71

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

The affiant, Richard Reid Rogers, being duly sworn, deposes and says:

1. He is and has been for many years an officer, to-wit, General Counsel, of the Panama Rail Road Company, under a fixed salary per annum as hereinafter shown.

72 2. The Panama Rail Road Company is a corporation organized under Chapter 284 of the Laws of the State of New York of 1849. Pursuant to the treaty between the United States and the Republic of Panama dated February 26, 1904, the United States in that year acquired, for the sum of $40,000,000, from the French Canal Company, all of its properties and rights upon the Isthmus of Panama, including ninety-eight and one-half per-

centum (98½%) of the capital stock of the Panama Rail Road Company; and immediately thereafter acquired the remaining one and one-half per-centum (1½%) of such capital stock; so that the Government of the United States is now and has been from substantially the beginning of its control and construction of the Panama Canal the sole owner of all of the capital stock of the railroad company.

3. The directorate of the Panama Rail Road Company consists of thirteen members. Each director has one qualifying share, but, upon death or resignation, this share, under a previous agreement, is turned over to the Government of the United States for the purpose of qualifying his successor in office. All dividends upon the stock, including the directors' qualifying shares, are paid over directly to the Government of the United States.

4. The Panama Rail Road Company operates a railroad across the Isthmus of Panama, conducts a commissary establishment for the benefit of the personnel of the Panama Canal, the Panama Rail Road Company and of the armed forces of the United States upon the Isthmus, and operates a dairy and two hotels, in connection therewith. It also, for the purpose of maintaining an independent and wholly-controlled line of communication between the United States and the Canal Zone, operates a line of steamships between New York and Cristobal, Canal Zone. These ships afford the personnel of the Panama Canal and the Panama Rail Road Company transportation to and from the United States at the nominal rate of from Twenty

Dollars ($20.00) to Thirty Dollars ($30.00) per trip, and carry freight for the Government of the United States to the Canal Zone at twenty-five per-centum (25%) less than the customary tariff rates. Over five thousand tickets for employees of the Government on the Isthmus of Panama, including employees of the Canal and of the Panama Rail Road Company, are sold annually by the railroad company at the reduced rates above referred to.

5. In addition to the various Acts of Congress bearing upon the status of the Panama Rail Road Company as a Government Agency, of which the
77 Commission or Court may take judicial notice, reference is made to the following Executive Orders and rulings of the officers of the Departments of the Government of the United States:

(a) Under the temporary Economy Act of June 30, 1932, (being Part II of the Legislative Appropriations Act for 1933; 47 Stat. 399), the Government having provided for a compulsory furlough without salary of all Government employees for the fiscal year ending June 30, 1933, and having defined "employee" to mean "any person rendering service in or under any branch of service of the United States Government," the President of the United States, under an order dated July 25, 1932,
78 provided, in the case of Panama Rail Road Company employees, for an equal distribution of the enforced furlough throughout the twelve months of the year; thus, in effect, reducing their monthly pay eight and one-third percentum (8⅓%).

(b) The temporary Economy Act, section 108, 47 Stat. 402, and the later Economy Act, Section 4, 47 Stat. 1513, having provided that in corpora-

tions a majority of the stock of which is owned by the United States Government, the holders of the stock on behalf of the United States Government should take such action as might be necessary to comply with the provisions of the Economy Act, resolutions were thereafter passed by the directors of the Panama Rail Road Company, under the direction of the Secretary of War, reducing the pay of the personnel and officers of the Panama Rail Road Company to conform to the provisions of the Economy Act.

(c) There are annexed hereto and made a part hereof copies of the following:

Exhibit 1: Excerpt from order of the President dated May 9, 1904, providing for the construction of the Panama Canal and among other things directing that the policy of the Panama Rail Road Company be harmonized with the policy of the Government, as an adjunct to the construction of the Canal.

Exhibit 2: Communication of General Smithers, Chief Coordinator of the United States Government, under date of March 28, 1927, to United States Shipping Board, stating the Chief Coordinator's conclusion after hearing on proposal to have the Shipping Board act as agent for the Panama Canal and to withdraw Panama Rail Road Company's steamship service between the United States and the Canal Zone.

Exhibit 3: Letter of Hon. Dwight F. Davis, Secretary of War, to the President of the United States, dated April 27, 1928, recommending the disapproval of the proposal of the Chairman of the Shipping Board that the Panama Rail Road Com-

82 *Exhibit 8 to Return—Affidavit.*

pany's steamship service be discontinued. The affiant further says that pursuant to the said letter the President took no action in furtherance of the recommendation of the Shipping Board; and that the policy outlined by Secretary of War Davis has been maintained by his successors in office.

Exhibit 4: Ruling of the Commissioner of Internal Revenue, dated March 11, 1918, that the Panama Rail Road Company was not subject to the provisions of Section 500 of the War Revenue Act approved October 3, 1917, imposing a tax of three percentum (3%) upon the amount paid for trans-
83 portation by rail and water.

Exhibit 5: Article 70 of Treasury Department Regulations No. 49, holding that transportation services rendered to agencies of the United States, among which was specifically included the Panama Rail Road Company, were exempt from the tax imposed by Section 500 of the Revenue Act of 1918 (40 Stat. 314).

Exhibit 6: Ruling of the Commissioner of Internal Revenue, dated August 5, 1919, that the Panama Rail Road Company was not subject to the Capital Stock Tax imposed upon corporations by Section 1000 of the Revenue Act of 1918 (40
84 Stat. 1126).

Exhibit 7: Ruling of the Commissioner of Internal Revenue, dated September 20, 1926, in response to an inquiry as to the application of Section 217(e) of the Revenue Act of 1926 (44 Stat., Part 2, p. 31): to the effect that the Panama Rail Road Company, being an agency of the United States Government, was not required to pay federal income taxes.

6. The affiant further says that he has been connected with the Panama Rail Road Company, in the capacity of General Counsel, since the year 1906; that he is familiar with the reasons which have animated the principal officials of the Government in maintaining the operations of the Panama Rail Road Company and the Panama Steamship Company under the New York charter of 1928; and that these reasons are, first, the greater facilities in handling accounts, as otherwise all gross receipts of the Panama Rail Road Company would have to be covered in the treasury of the United States and the operating expenses specifically provided for by Act of Congress; secondly, under the original concession of the State of Colombia to the Panama Rail Road Company, the Panama Rail Road Company was in receipt of valuable concessions of land upon the Isthmus of Panama, the status of which it is deemed undesirable to disturb.

Affiant says that William R. Pfizer has been employed as Secretary of the Panama Rail Road Company, Victor M. Newton as Treasurer and Richard Reid Rogers as General Counsel, at fixed salaries, during the periods covered by the hearing and protest filed in this case, as shown in tax returns and records of the Commission.

RICHD. REID ROGERS.

Sworn to before me this
15th day of December, 1934.

ANDERSON WOODS,
Notary Public.

(Seal) Kings County No. 345.
Certificate filed in N. Y. County No. 403.
Commission expires March 30, 1935.

88 *Exhibit 8 to Return--Exhibit 1 to Affidavit.*

Exhibit 1 to Affidavit.

White House,
Washington, D. C., May 9, 1904.

Sir:

By the act of Congress approved June 28, 1902, the President of the United States is authorized to acquire for, and on behalf of, the United States, all the rights, privileges, franchises, concessions, grants of lands, rights of way, unfinished work, plants, shares of the capital stock of the Panama Railway, owned by or held for the use of the new
89 Panama Canal Company, and any other property, real, personal and mixed of any name or nature owned by the said new Panama Canal Company situated on the Isthmus of Panama. The President is by the same act also authorized to acquire for, and on behalf of, the United States perpetual control of a strip of land on the Isthmus of Panama, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to excavate, construct, and maintain perpetually, operate and protect thereon, a ship canal of certain specified capacity and also the right to perpetually operate the Panama Railroad. Having acquired such rights, franchises, property, and control, the President is by the same act required
90 to excavate, construct, and complete a ship canal from the Caribbean Sea to the Pacific Ocean, and to enable him to carry forward and complete this work, he is authorized to appoint, by and with the consent of the Senate, an Isthmian Canal Commission of seven members, who are to be in all matters subject to his direction and control.

By the terms of the Canal Convention between the United States and the Republic of Panama, entered into in pursuance of the said act of Congress approved June 28, 1902, the ratifications of which were exchanged on the 26th day of February, 1904, the Republic of Panama granted to the United States:

First, the perpetual use, occupation, and control of a certain zone of land, land under water including islands within said zone, at the Isthmus of Panama, all to be utilized in the construction, maintenance, and operation, sanitation and protection of the ship canal, of the width of ten miles 92
extending to the distance of five miles on each side of the central line of the route of the canal, and the use, occupation, and control of other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of said canal or of any auxiliary canals or other works necessary and convenient for the same purpose; also the islands of Perico, Naos, Culebra, and Flamenico situated in the Bay of Panama, and

Second, all the rights, powers, and authority within the zone, auxiliary lands and lands under water, which the United States would possess and exercise if it were the sovereign of the territory granted, to the entire exclusion of the exercise by 93
the Republic of Panama of any such sovereign rights, power, and authority.

By the act of Congress approved April 28, 1904, the President is authorized, upon acquisition of the property of the new Panama Canal Company, and the payment to the Republic of Panama of the price for compensation agreed upon in the said Canal Convention, to take possession of, and occupy

94 *Exhibit 8 to Return—Exhibit 1 to Affidavit.*

on behalf of the United States, the zone of land, and land under water, including islands within said zone at the Isthmus of Panama of the width of ten miles extending to the distance of five miles on each side of the central line of the route of the Canal to be constructed thereon, including the islands of Perico, Naos, Culebra, and Flamenico, and from time to time as may be necessary and convenient certain auxiliary lands and waters outside the said zone for the purpose of constructing, maintaining, operating, sanitating, and protecting the ship canal, the use, occupation, and control where-
95 of were granted to the United States by the Republic of Panama in the said Canal Convention.

By the same act, the President is authorized, for the purpose of providing temporarily for the maintenance of order in the Canal Zone and for maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion, to delegate to such person or persons as he may designate and to control the manner of their exercise, all the military, civil and judicial powers as well as the power to make all needful rules and regulations for the government of the Canal Zone and all the rights, powers and authority granted by the said Canal Convention to the United States, until the close of the Fifty-eighth Congress.
96 Payments of the authorized purchase price of $40,000,000 to the new Panama Canal Company for the property of that corporation on the Isthmus, including the shares of railway stock, and for the records in Paris, and of the sum of $10,000,000, as stipulated in the Canal Convention, to the Republic of Panama for the rights, powers, and privileges granted to the United States by the terms of the

said convention, have been made and proper instruments of transfer have been executed by the Panama Canal Company. The members of the Isthmian Canal Commission have been appointed. They have organized the commission and entered upon their duties. I have taken possession of and now occupy, on behalf of the United States, the canal zone and public land ceded by the Republic of Panama.

* * * * * * *

By virtue of the ownership by the United States of about sixty-nine seventieths of the shares of the capital stock of the Panama Railroad the general policy of the managers of said road will be con- 98
trolled by the United States. As soon as practicable I desire that all the members of the Isthmian Canal Commission be elected to the board of directors of the road, and that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the construction of the canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama. If any contracts or other obligations now subsist between the railway company and other transportation companies that are not in accord with sound public policy, then such contracts must be terminated as soon as it is possible to effect that 99
object.

* * * * * * *

Very respectfully,

THEODORE ROOSEVELT.

WILLIAM H. TAFT,
Secretary of War.

100 *Exhibit 8 to Return—Exhibit 2 to Affidavit.*

Exhibit 2 to Affidavit.

OFFICE OF THE CHIEF COORDINATOR
WASHINGTON

March 28, 1927.

Mr. T. V. O'Connor, Chairman,
U. S. Shipping Board,
Washington, D. C.

My dear Mr. O'Connor:

The hearings requested in your letter of January
101 21, 1927, have been held. At these hearings the Shipping Board's plan to act as agent for the Army, Navy and Panama Canal was discussed at length. Condensed minutes and accompanying documentary matter have already been furnished you.

The fact was quite convincingly established in conference that ships of the character under discussion are an integral part of the military, naval and Panama Canal establishments: indispensable to them in the discharge of their normal responsibilities: and in no way related to the merchant fleet of potential war-time transports. The very nature of their responsibilities is such that none of these establishments can afford to risk reliance upon ships over which they do not exercise the
102 power of command.

The immediate *purpose* behind the Shipping Board's plan is to establish the Merchant Fleet Corporation in the position of shipping agent specifically for the military, naval and Panama Canal establishments and by implication for any other establishment of Government that may have need of overseas transportation. Its distant *object* is to further augment the flow of Government traffic into commercial channels.

The project contemplates without any guarantee of fulfillment the continuance of a service equal to or better than that now provided by each establishment for itself. This is predicated upon the assumption that Shipping Board vessels and those of commercial lines are sufficiently adaptable to be capable of meeting with dependable speed and certainty the unexpected demands to which Army and Navy transports and Panama Canal vessels are now subject. The plan predicts greater economy through lowered costs of operation without giving any assurance that, once dependence upon commercial sources is established, a reactionary rise in costs will not follow. 104

Nowhere is recognition given to a recourse to the dispensing powers of the President of the United States as a safeguard against unreasonable demands on the one hand or inferior service on the other. It is generally recognized and accepted in principle that both servitor and beneficiary must be subordinated to the dispensing powers of superior authority.

No establishment of Government dependent upon shipping for the fulfillment of its mission in Government may with impunity be placed in a position of forced dependence upon shipping that is less sensitive to the pressure of its own dispensing authority than are the vessels operated in its own service; nor may it safely be forced into dependence upon vessels whose movements are less responsive to the orders or desires of its own dispensing authority than are vessels operated directly under its own command. 105

It is quite conceivable that, given these powers of control delegated by the Chief Executive over Shipping Board agents as servitors of the Federal Government, a unified shipping organization could

be made to render effective service. It is quite possible that it might even return revenue to the Government and so lower costs of operation and maintenance. The Navy considers that shipping of this character operated by it has reached the irreducible minimum and such freight and passenger-carrying vessels as remain to it are armed auxiliaries to the fleet. The Army and the Panama Canal strongly support the same contention.

The time has not yet arrived to seriously consider the organization of a federally operated shipping service and certainly such an undertaking should
107 not be seriously contemplated until such time as the American Merchant Marine shall comprise an organized establishment made up of a disciplined body of officers and seamen, destined in time of war to pass perhaps, together with the Merchant Fleet Corporation, under naval control. Certainly no step in this direction should be undertaken except in pursuance of a plan of gradual absorption service replace those of the present independent services as they pass out of commission due to unin which vessels manned and equipped by a unified seaworthiness or incapacity for other cause.

Under these convictions I cannot lend my support to the promulgation of the proposed order that accompanied your letter of January 21st. I shall,
108 however, have the subject of Government overseas traffic in its entirety brought under observation and study by the Federal Traffic Board with a view to discovering whether any proper means may be found to foster to a greater degree than is now being done the interests of the American Merchant Fleet.

Very sincerely yours,

H. C. SMITHER,
Chief Coordinator.

Exhibit 3 to Affidavit.

(Letter from the Secretary of War, Dwight F. Davis, to the President.)

April 27, 1928.

Dear Mr. President:

In reply to letters addressed to you under date of March twenty-third and twenty-eighth, by the Chairman of the United States Shipping Board, regarding the activities of the Panama Railroad Steamship Line, I am sending herewith the detailed comments of the Vice-President of the Panama Railroad Company, together with a letter from the Governor of the Panama Canal and a copy of a previous memorandum from him on the same subject, and a letter from the Secretary of State enclosing report from the High Commissioner in Haiti, protesting against the suggested discontinuance of the service to Haiti. I also enclose copy of a report of the Chief Coordinator, made after a thorough investigation and hearings on this general subject. I am returning the letters from the Chairman of the Shipping Board, having retained copies for my files.

It is difficult to sum up the voluminous discussion in the enclosures, but I will attempt to summarize briefly the main features.

The two main considerations which apparently caused the original letters from the Chairman of the Shipping Board are based upon misconceptions and can be dismissed with the statements of fact that:

a. The Panama Railroad Steamship Line does not contemplate any extension of its service, and

112 *Exhibit 8 to Return—Exhibit 3 to Affidavit.*

b. It is not operating chartered steamers, as the titles are merely vested in the Panama Canal and not in the Steamship Company, and

c. The estimates for the construction of a new steamer was not for the extension of the service, but merely as a replacement.

The other issues raised in the letters have been frequently brought up in various forms in recent years and have uniformly been decided against the Shipping Board contentions, either directly or by
113 inaction, by the President, two former Secretaries of War, three Committees of Congress, and recently, after full hearing, by the Chief Coordinator.

The steamers of the Panama Railroad Steamship Line, built in American shipyards, operated by an American Corporation the capital stock of which is owned by the American government, are themselves a part of the American Merchant Marine.

The Line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country. Discussing
114 the proposal to rely only on privately-owned ships, the Governor of the Canal Zone writes:

> "I cannot see anything but disaster for the Canal from such procedure."

It would be directly opposed to sound military defense procedure and to the economical and business operation of the Panama Canal.

Regarding the proposal that the service to Haiti be discontinued, it was stated that this service was started at the earnest solicitation of the State and Navy Departments and that two Secretaries of State, Secretary Hughes and Kellogg, our High Commissioner in Haiti, General Russell, and all the important firms engaged in commerce between the United States and Haiti, have protested vigorously against the present, and previous similar suggestions. Secretary of State Kellogg writes on April 12, 1928:

> "I feel that very unfortunate results might be expected to follow the cessation of the service." 116

The High Commissioner

> "strongly recommends that the Department protest against the discontinuation of this valuable service."

It is not believed that the discontinuance of this service would greatly benefit American shipping. When the Panama Railroad Steamship Line withdrew its service from all Haitian ports other than Port au Prince, for the sole purpose of helping an American Line, it was stated by the U. S. Consul at Haiti that within a short time the Royal Dutch 117
Line had captured eighty-five per cent of the business and the same result would follow the discontinuance of the present service. Therefore I believe that the withdrawal of this service would be a serious blow to American commerce in Haiti; that it would be opposed by American and Haitian shippers; that it would detrimentally affect American relations with Haiti and that the principal, if

not the sole beneficiary, would be a foreign steamship line. I therefore oppose strongly the discontinuance of this service.

The situation in the case of the West Coast Line is somewhat similar. The Grace Line is the only other American line operating in the West Coast service and it has recently announced that it will soon withdraw its American flag steamers. The owners of this line are primarily bankers, merchants, etc., and as such are regarded as competitors by the importers and exporters of Colombia and Ecuador. It is believed that these merchants
119 would refuse to ship on the line of their rival and that therefore the greater part of the commerce now carried on our steamers would be diverted to the Royal Mail Steam Packet Company under the British flag. The discontinuance of our line would probably be seriously objected to by exporters and importers interested, would injure American commerce and might have a prejudicial effect on our friendly relations with Colombia. As stated, the probable effect would be to benefit British, rather than American shipping.

These matters and others raised in the basic letters are treated at length in the paper prepared by the Panama Railroad Steamship Company officials. After a careful study of the various papers, including
120 the letters from the Secretary of State and the High Commissioner in Haiti, the findings of the Chief Coordinator and other documents, I recommend that the proposals of the Chairman of the Shipping Board be disapproved.

Very respectfully,

DWIGHT F. DAVIS,
Secretary of War.

Exhibit 4 to Affidavit.

March 11, 1918

Commissioner of Internal Revenue
Address reply to Commissioner
of Internal Revenue and refer
to ST-RCB

The Panama Canal,
Mr. A. L. Flint, Chief of Office,
Washington, D. C.

Sir:—

Receipt is acknowledged of your letter of February 15, 1918, relative to the application of the provisions of Section 500 of the Act of October 3, 1917, to transportation services performed for the Panama Rail Road Company. 122

In reply, you are advised that payments made from the treasury of the United States for transportation or other services are exempt from the tax, *and as payments for services rendered the Panama Railroad Company are in substance payments for services rendered the United States, under the provisions of section 502 of the Act they are exempt from the tax.*

Copies of T. D. 2551 and 2597, relative to exemption, are herewith enclosed for your information. 123

Respectfully,

B. C. KEITH,
Deputy Commissioner.

124 *Exhibit 8 to Return—Exhibit 5 to Affidavit.*

Exhibit 5 to Affidavit.

(Excerpt from Treasury Department Regulations No. 49.)

Article 70. Government agencies. Transportation services rendered to agencies of the United States are exempt from the tax. Such agencies include the American National Red Cross, United States Shipping Board Emergency Fleet Corporation, United States Food Administration Grain Corporation, United States Fuel Administration, United States Housing Corporation, Commission
125 on Training Camp Activities, War Savings Committee, Liberty Loan Committee, War Industries Board, Federal Farm Appraisers, Federal Land Banks, Federal reserve banks, *Panama Railroad Co.*, and similar agencies supported by Government funds.

(Copied from Corporation
Trust War Tax Service
1919.)

126

Exhibit 6 to Affidavit.

TREASURY DEPARTMENT

August 5, 1919.

Office of Commissioner
of Internal Revenue.

Panama Railroad Co.,
21 State Street,
New York, N. Y.

Gentlemen:

128 Reference is made to your capital stock tax return, Form 707, filed with the Collector October 30, 1918.

Kindly inform this office of any provisions in the corporation's charter or of any existing agreement involving the liability of your company for taxes.

In the absence of any such requirements it would appear that the Panama Rail Road Company is a Government agency and is not liable for capital stock tax. If this assumption is correct, you are at liberty to file claim for refund of $14,896.00 amount of tax paid, using the enclosed form, and stating full particulars.

Your reply is desired within 15 days. 129

Respectfully,

M. W. RUDDICK
Acting Deputy Commissioner.

130 *Exhibit 8 to Return—Exhibit 7 to Affidavit.*

Exhibit 7 to Affidavit.

TREASURY DEPARTMENT
WASHINGTON

September 20, 1926.

Office of Commissioner of
Internal Revenue

Panama Rail Road Company,
24 State Street,
New York, New York.

131 Attention: V. M. Newton,
Acting Third Vice-President.

Sirs:—

Reference is made to your letter dated February 24, 1926, relative to the application of Section 217(e) of the Revenue Act of 1926 to the net income derived from your coal and commissary operations in the Canal Zone.

It appears that you are a domestic corporation and that under the authority of Section 1 of the Isthmian Canal Act of June 28, 1902, the United States acquired your entire capital stock. It further appears that for the purpose of the tax imposed by Section 500 of the Revenue Act of 1917,
132 it was held that you were an agency of the United States Government.

Inasmuch as you are a governmental agency you are not required to file Federal income tax returns or to pay Federal income taxes.

Respectfully,

D. H. BLAIR,
Commissioner.

Exhibit 9 to Return.

Determination of State Tax Commission.

This is printed as Schedule A to Petition for Certiorari, beginning on page 6, and is therefore omitted here.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the petition for a writ of certiorari, the order granting the writ of certiorari, the writ of certiorari, the return to the writ of certiorari, and the exhibits and pertinent and material parts of exhibits annexed to said return, and the whole thereof, which are on file in the office of the Clerk of the County of Albany; and certification thereof is hereby waived.

Dated, June 22, 1935.

RICHARD REID ROGERS,
Relator in Person.

JOHN J. BENNETT, Jr.,
Attorney-General of the State
of New York,
Attorney for Respondents.

136 **Order of Appellate Division Appealed From.**

At a Term of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held at the County Court House in the City of Albany, New York, commencing on the 17th day of September, 1935.

Present:

Hon. James P. Hill, *Presiding Justice*,
Hon. Leon H. Rhodes,
Hon. Daniel V. McNamee,
Hon. John C. Crapser,
Hon. Christopher J. Hefkernan.

137

The People of the State of New York *ex rel.* Richard Reid Rogers,

Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

138

The relator, Richard Reid Rogers, in the above-entitled proceeding having heretofore and on the 26th day of April, 1935, obtained an order and writ of certiorari to review a final determination of the State Tax Commission, made on or about the 30th day of March, 1935, assessing additional income taxes against the relator for the calendar years

1927, 1928 and 1929, and return to said order and writ of certiorari having been duly made, and the issues raised having come on for hearing before this Court at the above named term thereof; and the cause having been argued and the relator having appeared in person, and the respondents having appeared by Hon. John J. Bennett, Jr., Attorney General of the State of New York, Joseph M. Mesnig, Assistant Attorney General, of counsel, their attorney, and due deliberation having been had thereon,

NOW, on motion of John J. Bennett, Jr., Attorney General of the State of New York, attorney for respondents, it is

ORDERED, that the said determination of the State Tax Commission, made on or about the 30th day of March, 1935, be, and the same hereby is, unanimously confirmed, with fifty dollars costs and disbursements.

JOHN S. HERRICK,
Clerk.

142 **Opinion of Appellate Division.**

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
143 Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

Argued September Term, 1935.
Decided November Term, 1935.

Before:

HON. JAMES P. HILL,
Presiding Justice;

144 HON. LEON G. RHODES,
HON. DANIEL V. MCNAMEE,
HON. JOHN C. CRAPSER,
HON. CHRISTOPHER J. HEFFERNAN,
Associate Justices.

Review by certiorari from a determination of the State Tax Commission assessing additional income taxes against relator for the calendar years 1927, 1928 and 1929.

RICHARD REID ROGERS, relator, *pro se*, 74 Trinity Place, New York City, N. Y.

HON. JOHN J. BENNETT, JR., Attorney General (JOSEPH M. MESNIG, HENRY EPSTEIN, of counsel), attorney for respondents, The Capitol, Albany, N. Y.

OPINION FOR CONFIRMATION.

HEFFERNAN, *J.*:

Relator has invoked the writ of certiorari under the provisions of Sections 375 and 199 of the Tax Law to review a final determination of the State Tax Commission assessing additional income taxes against him for the calendar years 1927, 1928 and 1929.

During the years in question relator was employed by the Panama Rail Road Company as general counsel at an annual salary of $15,000.00. In filing his income tax returns for those years he acknowledged receipt of the income, but did not include it as part of his gross income for tax purposes. Assessments for the tax computed thereon were made by the Tax Commission.

The Panama Rail Road Company is a New York corporation created by Chapter 284 of the Laws of 1849. That act authorized certain named individuals to form a corporation known as Panama Rail Road Company, with a capital stock of not to exceed $5,000,000, for the purpose of constructing and operating a railroad across the Isthmus of Panama under a grant made to three named individuals by the then Republic of New Grenada. As

an incidental power it was authorized to own and operate steamships. Six years later by Chapter 364 of the Laws of 1855 it was granted certain additional powers and permitted to increase its capitalization to an amount not to exceed $7,000,000, its present capitalization.

So far as the record discloses it was apparently privately owned and operated for about fifty-five years, when its entire capital stock was acquired by the United States. The entire capital stock except directors' shares is still owned of record by the United States. The Company is managed
149 by a board of thirteen directors, each of whom holds one share of stock. The directors are elected by the Secretary of War in his capacity as stockholder of record of 69,987 shares. The capital stock consists of 70,000 shares of the par value of $100.00.

The Panama Rail Road Company conducts a general transportation business and has its principal office in the City of New York. At New York City it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents. It operates a line of steamships between New York and Canal Zone, carrying passengers and cargo. Its steamers have also operated to Haiti and South America. The
150 Company also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels. The Company engages in commercial business and its tariffs correspond to those of competing private carriers. It carries government freight and government employees at reduced rates. The Company has been operating at a profit and has been paying dividends. Its employees are paid directly by the Company from

moneys derived from the Company's operations. No liability rests upon the United States because of any claim for damages which might lie against the Company. In competition with privately owned ocean carriers the corporation operates a fleet of steamships. It solicits and accepts commercial freight and passenger business, carrying government freight and passenger business at reduced rates.

Assuredly the railroad was originally conceived, constructed and operated as a private commercial, profit-making enterprise. That the commercial and proprietary character of the Company was to be continued after the United States acquired the stock is strikingly attested by the communication which President Theodore Roosevelt addressed to the then Secretary of War, dated May 9, 1904. Mr. Roosevelt expressed a desire "that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the construction of the canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama."

Relator's contention is that the Panama Rail Road Company is an instrumentality of the United States; that as such the Company is exempt from State taxation; and that, the Company being so exempt, the salaries of its officers and employees are likewise exempt.

The learned counsel for respondents asserts that the real point in issue is not only whether the Panama Rail Road Company is an instrumentality of the United States, but whether the Company is engaged in the conduct of either an essential or useful governmental function.

Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Relator, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal Government and the various State governments are mutually immune from taxation by the other. The
155 doctrine is thoroughly imbedded in our jurisprudence that a State is without power to tax the property or the agencies or instrumentalities of the United States. Similarly, the Federal Government lacks power to tax State property or agencies (*Van Brocklin* v. *Tennessee*, 117 U. S. 151; *McCulloch* v. *Maryland*, 4 Wheat. 436; *Collector* v. *Day*, 11 Wall. 113).

Immunity from taxation extends only to agencies and instrumentalities engaged in usual governmental functions (*Railroad Company* v. *Peniston*, 18 Wall. 5; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123).

In *South Carolina* v. *United States* (199 U. S. 437) it was held that the exemption of State agen-
156 cies and instrumentalities from Federal taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business. Thus, Mr. Justice Brewer, speaking for the court, said:

> "Now, if it be well established, as these authorities say, that there is a clear distinc-

tion as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

A question very similar to that presented in *South Carolina* v. *United States, supra*, was decided by the United States Supreme Court in *Ohio* v. *Helvering* (292 U. S. 360). The court reiterated the principle that whenever a State engages in a business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. In that case it was said:

"If a State chooses to go into the business of buying and selling commodities its right to do so may be conceded * * * but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its quasi sovereignty *pro tanto*, and takes on the character of a trader, so far at least as the taxing power of the federal government is concerned."

In *Flint* v. *Stone Tracy* (220 U. S. 108) Mr. Justice Day, speaking for the court, said:

> "It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies whose business is prosecuted for private emolument and advantage. For the purpose of taxation they
> 161 stand upon the same footing as other private corporations upon which special franchises have been conferred."

The ever-widening activities of government made it inevitable that the question should again be presented to the Supreme Court of the United States and in 1934 (*Helvering* v. *Powers,* 293 U. S. 214) there was presented the question whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of the Federal income tax, immunity being claimed upon the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumen-
162 talities of its government. It appeared that the railway company encountered financial difficulties and, by act of the Massachusetts Legislature, agreed to by the company, was taken over by the State to be publicly operated and managed for a limited period of time. It was not disputed that the trustees who were to manage the company were officers of the State and that their salaries were fixed by the Legislature, though they were to be paid from

the operations of the company. The Supreme Court of Massachusetts had previously been called upon to interpret the act in question and had characterized the operation of the railway by the State as being "undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare." The Supreme Court held that the salaries of the trustees were not constitutionally immune from the imposition of the Federal income tax.

There followed the decision of the Circuit Court of Appeals, Second Circuit, in *Commissioner* v. *Modjeski* (75 Fed. [2nd] 468). In this case Dr. Modjeski, an eminent consulting engineer in the employ of the Delaware River Joint Commission in connection with the construction of a bridge over the Delaware River, sought exemption of his salary from Federal income taxation. The court, while discussing the question of "essential governmental functions" and "usual governmental functions," based its holding on a finding that Dr. Modjeski was an independent contractor and, for that reason, subject to taxation. The court said:

> "Whether the commission was a governmental agency engaged in the exercise of a usual governmental function or merely carrying on the ministerial or proprietary functions for inhabitants of the interested states, we need not decide."

The question whether the creation of port facilities, the building of bridges, highways and tunnels were essential or usual governmental functions, which was avoided in the *Modjeski* case, *supra*, was squarely presented and decided by the same court in *Commissioner* v. *Ten Eyck* (76 Fed. [2nd] 515),

a case involving the Federal taxation of the salary of the chairman of the Albany Port District Commission. The court reviewed in detail the creation, the powers and the activities of the Commission. It found that the construction of port and harbor or terminal developments and facilities were, classically and historically, governmental functions, usually conducted by governmental agencies. The court said:

> "The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not
167 withdrawing sources of revenue from the Federal taxing power. It has supplanted no private business to which the Federal taxing power would normally extend. If a private corporation performs public services for a profit, it cannot be said to be exercising governmental functions simply because of that service."

The court reviewed the Supreme Court decisions in the State liquor dispensary cases, *Ohio* v. *Helvering, supra,* and *South Carolina* v. *United States, supra,* and said:

> "It is the entrance into a trade enterprise that distinguishes these cases, relied upon
168 by the petitioner (Commissioner of Internal Revenue). It cannot be maintained that there is involved in the instant case a trade or business, entered into for profit, constituting a proprietary enterprise. Revenues are not profits, but revenues, like tolls collected from users of a State improvement, are merely means by which the State attempts to recoup in some part its legitimate expenses."

The Court affirmed the ruling of the United States Board of Tax Appeals that the salary of the Chairman of the Albany Port District Commission was not subject to Federal taxation.

The operation of steamships, railroads, stores, hotels or dairies has not the slightest relationship to any governmental function. Common sense compels the conclusion that such activities are intrinsically, traditionally and historically of a commercial and proprietary nature. And this is further reinforced when it is considered that the particular activities here in question have a background of fifty-five years of private, commercial operation. 170
As Mr. Justice Day said in *Flint* v. *Stone Tracy, supra,* it is no part of the essential governmental functions of a State to provide means of transportation.

It seems clear to us that the Panama Rail Road Company is a government-controlled corporate agency engaged in a commercial proprietary function. This case must be decided upon the principles laid down in *South Carolina* v. *United States, supra, Ohio* v. *Helvering, supra,* and *Helvering* v. *Powers, supra.* Assuredly, the ownership and operations of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to 171
the operation of a street railway. And this particularly where such operation is in continuation and expansion of earlier private, commercial operation. The commercial nature of the functions of the Panama Rail Road Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States. These operations constitute an activity

to which, unquestionably, the taxing power of the State would normally extend. Under the decision in *Helvering* v. *Powers, supra,* the Federal Government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend.

The mutual and complementary immunity from taxation of State and Federal instrumentalities of government is implicit in our constitutional form of government and is founded in the doctrine that
173 power to tax is power to destroy (*McCulloch* v. *Maryland, supra*).

It seems apparent that the principle of immunity, interfering as it does with the exercise of a vitally important, plenary sovereign power, ought only to be invoked and employed when there is a direct and imminent hindrance to, or restraint upon, functions which are unquestionably properly and usually governmental in their character. Otherwise, little will remain beyond an ever-dwindling semblance of State sovereignty, if immunity from State taxation is sought and allowed in the case of all of the constantly broadening activities of the Federal Government.

174 The determination of the State Tax Commission should be confirmed with $50.00 costs.

Notice of Appeal to the Court of Appeals.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

PLEASE TAKE NOTICE that Richard Reid Rogers, the relator in the above-entitled proceeding, hereby appeals from the order of the Appellate Division of the Supreme Court for the Third Judicial Department entered on the 18th day of November, 1935, confirming the final determination of the State Tax Commission made on or about the 30th day of March, 1935, assessing additional income taxes against the relator for the calendar years 1927, 1928 and 1929; and awarding costs and disbursements to the respondents against the relator. And this appeal is taken from each and every part of said order as well as from the whole thereof.

Dated, New York, N. Y., December 27, 1935.

RICHARD REID ROGERS,
Relator, *pro se*,
Office & P. O. Address,
74 Trinity Place,
Borough of Manhattan,
New York, N. Y.

178 *Notice of Appeal to the Court of Appeals.*

To:

THE CLERK OF THE APPELLATE
DIVISION OF THE SUPREME COURT,
THIRD JUDICIAL DEPARTMENT,
Albany, New York.

THE ATTORNEY-GENERAL OF THE
STATE OF NEW YORK,
Attorney for Respondents,
Albany, New York.

Stipulation Waiving Certification.

179 Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal to the Appellate Division of the Supreme Court for the Third Department, the order of the Appellate Division confirming the determination of the State Tax Commission, the opinion of the Appellate Division on said appeal, and the relator's notice of appeal to the Court of Appeals from said order; and certification thereof is hereby waived.

Dated, New York, March 16, 1936.

180 RICHARD REID ROGERS,
Relator *pro se*,

JOHN J. BENNETT, JR.,
Attorney-General of the State
of New York,
Attorney for Respondents.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, SS:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of April in the year of our Lord one thousand nine hundred and thirty-six, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—April 29, 1936

[fol. 62] THE PEOPLE, ETC., ex Rel. RICHARD REID ROGERS, Appellant,

ag'st

MARK GRAVES & ors., as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Be it Remembered, That on the 18th day of March, in the year of our Lord one thousand nine hundred and thirty-six, Richard Reid Rogers, the appellant in this cause, came here into the Court of Appeals, by Richard Reid Rogers, pro se, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Mark Graves and others, as Commissioners constituting the State Tax Commission of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Richard Reid Rogers, of counsel for the appellant; and by Mr. Joseph M. Mesnig, of counsel for the respondents; and after due deliberation had there-

on, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

[fol. 63] And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office,

Albany, April 29, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 63½] SIR:

Take notice that the within is a copy of Remittitur duly filed and entered in the office of the Clerk of Albany County, on the 2nd day of May, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Richard Reid Rogers, Esq., Attorney for Appellant, 521 Fifth Ave., New York, N. Y.

[fol. 64] IN COURT OF APPEALS OF NEW YORK

CLERK'S CERTIFICATE OF NO OPINION BY COURT OF APPEALS

I, John Ludden, Clerk of the Court of Appeals of the State of New York, Do Hereby Certify that no opinion was handed down by said Court of Appeals of the State of New York in affirming the order appealed from in the case of The People &c., ex rel. Richard Reid Rogers, Appellants, against Mark Graves and others, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Albany in the State of New York this twelfth day of June A. D. 1936.

John Ludden, Clerk. (Seal State of New York, Court of Appeals.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 65] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

Present: Hon. Gilbert V. Schenck, Justice Presiding.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of RICHARD REID ROGERS, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

ORDER ON REMITTITUR—May 2, 1936

The relator above named having appealed to the Court of Appeals from a final order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled proceeding, which order unanimously confirmed a final determination of the respondents as Commissioners constituting the State Tax Commission of the State of New York, made on or about the thirtieth day of March, 1935, assessing additional income taxes against the

relator for the calendar years 1927, 1928 and 1929, and which said final order was duly entered in the office of the Clerk of the Appellate Division, Third Department, and the appeal having been duly argued at the Court of Appeals, and after due deliberation had thereon, the Court of Appeals having made its decision, and having ordered [fol. 66] and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading the remittitur from the Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the above named respondents, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, that the respondents have judgment against Richard Reid Rogers, the relator herein, for their costs and disbursements in the Court of Appeals, to be taxed.

Gilbert V. Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 66½] SIR:

Take notice that the within is a copy of Order duly filed and entered in the office of the Clerk of Albany County, on the 2nd day of May, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Richard Reid Rogers, Esq., Attorney for Relator, 521 Fifth Avenue, New York, N. Y.

[fol. 67] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the Court of Appeals of the State of New York:

1. The petitioner is the appellant in the above-entitled cause.

2. On the 18th day of November, 1935, the Appellate Division of the Supreme Court of the State of New York for the Third Department confirmed the final determination of the State Tax Commission made herein on or about the 30th day of March, 1935, whereby there were subjected to taxation by the State of New York the annual salaries of officers of the Panama Rail Road Company, including the annual salary of this relator as General Counsel for the years 1927, 1928 and 1929. From this order an appeal was taken to this Court, the court of last resort in this State, which, on the 28th day of April, 1936, affirmed the order and decision of the Appellate Division. Thereafter, upon the remittitur of this Court, and on the 2nd day of May, 1936, a final judgment against appellant was entered in the Supreme Court of the State of New York, in the County of Albany.

3. There was error in the final judgment and proceedings in this Court, and in the final judgment entered in the New York Supreme Court on the remittitur of this Court, as [fol. 68] more particularly appears from the assignment of errors submitted herewith, whereby the petitioner is aggrieved; in that, in the decision and order of the Appellate Division, as affirmed by this Court, there is drawn in question the validity of a statute of the State of New York, to-wit, Article 16 of the Tax Law of New York, being Chapter 627 of the Laws of 1919, section 1, as amended, and particularly section 351 in said article, in so far as said statute authorized the annual salaries paid the petitioner by the Panama Rail Road Company, an instrumentality of the Government of the United States, to be taxed by the State of New York, upon the ground that the said statute is repug-

nant to and in contravention of the Constitution of the United States, and in particular of Article 1, section 8, thereof, and the decision and judgment aforesaid is in favor of the validity of the said statute.

Wherefore, the petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Court of Appeals of the State of New York and of the Supreme Court of the State of New York entered on remittitur of the Court of Appeals, against the petitioner, to the Supreme Court of the United States; in order that the decision and judgment of the Court of Appeals and of the Supreme Court of the State of New York may be examined and reversed; and further prays that a transcript of the record, papers and proceedings in the cause, duly authenticated by the Clerk of the Supreme Court of New York in the County of Albany, may be sent to the Supreme Court of the United States, as provided by law.

Dated at New York, N. Y., June 2, 1936.

Richard Reid Rogers, Petitioner, pro se.

Due and timely service admitted, this June —, 1936.

——— ———, Attorney-General of New York, by ———
———, Atty. for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 69] In Court of Appeals of New York

[Title omitted]

Order Allowing Appeal

On this 3rd day of June, 1936, on reading the petition of Richard Reid Rogers, the above-named relator and appellant, praying for the issuance of an order allowing an appeal in his behalf to the Supreme Court of the United States from the decision of this Court, the court of last resort in this State, affirming the order and decision of the Appellate Division for the Third Department, and from the final judgment entered herein in the Supreme Court of the State of New York on the remittitur of this Court; and

on reading the assignment of errors and the statement as to jurisdiction submitted by the appellant with said petition; and it appearing therefrom, and from the record in the above cause, that there is drawn in question the validity of a statute of this State, to-wit, Article 16 of the Tax Law of the State of New York, being Chapter 627 of the Laws of 1919, section 1, as amended, and particularly section 351 in said article, upon the ground that in so far as said statute authorized the taxation of an instrumentality of the Government of the United States and the annual salaries paid by such instrumentality to this appellant and other officers of the said instrumentality the same was repugnant to the Constitution of the United States and particularly to Article 1, section 8 thereof; and it further appearing that the de-[fol. 70] cision of this Court and the final order and judgment of the Supreme Court of this State entered upon the remittitur of this Court are in favor of the validity of said statute, and that the petition herein is proper for the issuance of this order; and it appearing from the underwritten consent signed by the attorney for the respondents that the taxes which are the subject of this proceeding have been paid by the relator-appellant to the State Tax Commission under protest, and that the costs of this appeal are secured by a bond in the sum of $500 heretofore filed with the said Commission, the attorney for the respondents waiving further security;

Now, therefore, it is

Ordered by the undersigned, the Chief Judge of the Court of Appeals of the State of New York, that the said appeal be and the same hereby is granted; and it is

Further Ordered, that no further security shall be required as a condition of allowing this appeal; and it is

Further Ordered, that the Clerk of the Supreme Court of the State of New York, in the County of Albany, within thirty days from the date hereof, make and transmit to the Clerk of the Supreme Court of the United States, under his hand and the seal of said court, a transcript of the record, containing a true copy of all the material parts of the record herein which shall be designated and filed with him by any of the parties hereto.

(Sgd.) Frederick E. Crane, Chief Judge of Court of Appeals.

The relator having heretofore paid (under protest) to the State Tax Commission the taxes which are the subject of this proceeding, and having heretofore filed a bond in the sum of $500 with said Commission covering all costs including the costs of this appeal, the respondents waive the filing of additional security on this appeal.

June 3, 1936.

(Sgd.) John J. Bennett, Jr., Attorney-General of New York, By Joseph M. Mesnig, Assistant Attorney-General.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 70½] Due and timely service admitted, this June —, 1936.

—— ——, Attorney-General of New York, by —— ——, Atty. for Respondents-Appellees.

[fol. 71] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in affirming the order and judgment of the Appellate Division of the Supreme Court holding that the New York State income tax law, in so far as it authorized the taxation of the annual salary paid by the Panama Rail Road Company to the appellant, was valid—the Constitution of the United States and particularly Article 1, section 8, thereof, to the contrary notwithstanding.

2. The said Court erred in failing to render judgment in favor of the appellant.

3. The said Court erred in holding that the Panama Rail Road Company, even though an instrumentality of the United States Government, had forfeited its immunity from State taxation because it engaged in certain commercial activities; and that the salaries paid its essential officers, including the annual salaries paid the appellant for the years 1927, 1928 and 1929, were therefore subject to State income taxation.

4. The said Court erred in not holding that such commercial activities, even if conducted at a profit, were only incidental to the main purpose of the Panama Rail Road Company as an adjunct of the United States Government [fol. 72] in carrying on the work of construction, maintenance and protection of the Panama Canal, which main purpose was within and not a departure from the usual governmental functions of the United States.

Dated at New York, N. Y., June 2, 1936.

Richard Reid Rogers, Relator-Appellant, pro se.

Due and timely service admitted this June —, 1936.

—— ——, Attorney-General of New York, by ——
——, Attorney for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 73] Citation, in usual form, showing service on John J. Bennett, Jr., omitted in printing.

[fol. 74] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL

SIRS:

Please Take Notice that the undersigned relator-appellant herein designates the following papers as material and necessary parts of the certified transcript of record herein on appeal to the Supreme Court of the United States:

1. Record on appeal to the Court of Appeals.
2. Remittitur of Court of Appeals to Supreme Court of State of New York.
3. Clerk's statement showing no opinion rendered by Court of Appeals.
4. Order of Supreme Court of State of New York on remittitur of Court of Appeals.
5. Petition for allowance of appeal to United States Supreme Court.

6. Order allowing appeal to United States Supreme Court.

7. Assignment of errors on appeal to United States Supreme Court.

8. Statement as to jurisdiction on appeal to United States Supreme Court.

[fol. 75] 9. Statement directing attention to paragraph 3 of Rule 12 of the United States Supreme Court.

10. Citation on appeal to United States Supreme Court, with proof of service.

11. Appellant's præcipe for record on such appeal, with proof of service.

Richard Reid Rogers, Relator-Appellant, pro se.

To Hon. John J. Bennett, Jr., Attorney-General of New York, Attorney for Respondents-Appellees, Albany, N. Y. The Clerk of the Supreme Court of the State of New York, Albany County, Albany, N. Y.

Due and timely service of the foregoing præcipe is hereby acknowledged, this 11 day of June, 1936.

John J. Bennett, Jr., Attorney-General of New York, by John H. Mensig, Attorney for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 76] UNITED STATES SUPREME COURT

STATEMENT UNDER RULE 13, PARAGRAPH 9—Filed June 26, 1936

1. For a statement of the points on which he intends to rely on this appeal, the appellant respectfully refers to the assignment of errors heretofore filed by him on this appeal, and asks that said assignment of errors be treated as such statement of points.

2. The appellant further states that he thinks the entire record necessary for the consideration of the said appeal.

Dated at New York, N. Y., June 23, 1936.

Richard Reid Rogers, Appellant, pro se.

Due and timely service of the foregoing statement is hereby admitted, this 24th day of June, 1936.

John J. Bennett, Jr., Attorney-General. Joseph M. Mesnig, Counsel for Appellees.

[fol. 77] [File endorsement omitted.]

Endorsed on cover: File No. 40,679. New York Supreme Court. Term No. 139. The People of the State of New York upon the relation of Richard Reid Rogers, appellant, vs. Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York. Filed June 26, 1936. Term No. 139, O. T., 1936.